

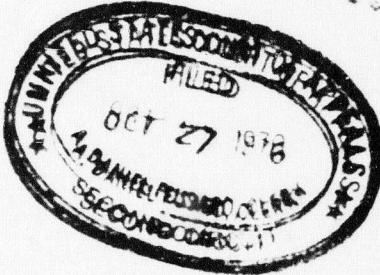
*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-7340

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT



APPELLANTS' BRIEF-DOCKET NO. 76-7340

DISTRICT COURT (CIV. NO. B-947)

EDMOND PFOTZER AND E. JOHN PFOTZER, ETC.,

Plaintiffs-Appellants,

v.

AMERCOAT CORPORATION AND AMERON, INC.,

Defendants-Appellees.

DOCKET NO. B-947

APPEAL FROM U.S.D.C. CONNECTICUT RULING DENYING PLAINTIFFS'
MOTION TO SET ASIDE STIPULATION OF DISMISSAL.

Sat below: NEWMAN, D. J.

Edmond Pfotzer and E. John Pfotzer

Appellants pro se

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Wilmington, Delaware 19899

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PRELIMINARY STATEMENT

The plaintiffs appeal, in Civil Action No. B-947, from the District Court (District of Connecticut) ruling denying plaintiffs' "MOTION TO SET ASIDE STIPULATION OF DISMISSAL" as entered between the parties on November 11, 1974.

Sat below - Newman, D. J. Ruling not reported.

STATEMENT OF ISSUES PRESENTED

1. In Civil Action No. B-947, did not the District Court err in denying plaintiffs' "MOTION TO SET ASIDE STIPULATION OF DISMISSAL" between the parties as dated November 11, 1974, in that:

(a) There was a subsequent failure of defendants' consideration as had been promised the plaintiffs for their participation in the said stipulation?

(b) That there was sufficient evidence produced by the plaintiffs to evidence that the said "STIPULATION OF DISMISSAL" entered in the court below was in fact the product of defendant's fraud in the inducement thereof?

(c) That as a consequence of either, or both (a) and (b), supra, are plaintiffs as a matter of law or equity entitled to have the said "STIPULATION OF DISMISSAL" between the parties, dated November 11, 1974 set aside, and for the plaintiffs to have their "FIRST AMENDED COMPLAINT", filed August 20, 1974 (App. 11a to 27a inclusive) reinstated on the active Civil Docket of the United States District Court for the State of Connecticut?

STATEMENT OF CASENATURE OF CASE

Plaintiffs, in the First Count of their "FIRST AMENDED COMPLAINT", (App. 11a), seek damages against defendant, Amercoat, as a consequence of defendant's misrepresentations and breach of warranty.

The Second Count (App. 13a) is against the defendant, Amercoat, as a consequence of its having practiced wilfull fraud in inducing plaintiffs to purchase said defendant's piping material.

The Third Count against Ameron Inc. (App. 14a) as a consequence of its and Amercoat's merger repeats against Ameron, Inc. the First and Second Counts, supra.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiffs, refer to "INDEX TO THE DOCKET RECORD ON APPEAL" (App. 1a to 5a inclusive) and "INDEX TO THE RECORD ON APPEAL" (APP. 127a to 13a inclusive).

(1) Plaintiffs filed their First Amended Complaint on August 12, 1974 (App. 3a-11a to 14 inclusive).

(2) Plaintiffs and defendants filed their voluntary "STIPULATION OF DISMISSAL" on November 13, 1974 (App. 4a-28a to 29a inclusive).

(3) Plaintiffs on March 11, 1976, filed their "MOTION TO SET ASIDE THE STIPULATION OF DISMISSAL DATED NOVEMBER 11, 1974, and AFFIDAVIT IN SUPPORT, ETC." (4a-30a to 32a inclusive).

(4) Plaintiffs on April 20, 1976 filed their "SUPPLEMENTARY AFFIDAVIT IN SUPPORT OF THEIR MOTION TO SET ASIDE STIPULATION OF NOVEMBER 11, 1974 (App. 4a-33a to 82a inclusive.).

(5) On May 13, 1976, the District Court, Newman J. denied plaintiffs' "MOTION TO SET ASIDE STIPULATION ETC." filed and entered (App. 5a-8a-9a).

(6) On May 24, 1976 plaintiffs filed their "MOTION FOR REARGUMENT PERTINENT TO PLAINTIFFS' MOTION OF MARCH 9, 1976 ETC." with memorandum in support (App. 5a-87a-88a).

(7) On June 14, 1976, the District Court, Newman J. denied plaintiffs' "MOTION FOR REARGUMENT" filed May 24, 1976 (App. 5a-87a-88a).

(8) On June 28, 1976, "PLAINTIFFS' NOTICE OF APPEALS" - from orders of May 13, 1976 and June 14, 1976, filed (App. 5a-6a-7a).

FACTS¹

Plaintiffs (appellants herein) are of the opinion that this court should not be obliged to decide the subject appeal without an adequate factual background on which to base its considerations and decisions.

Such factual background is considered necessary for pertinent reference, and even at the sacrifice of otherwise including essential additions to plaintiffs' (Pfotzers) brief. The latter particularly because of the unusual aspects of the basic facts from which the initial claims arose. Accordingly, this court is informed that:

The defendants Amercoat-Ameron, (appellees herein) are the plaintiffs in Civ. No. 14326, as was filed in October 1969, in the Superior Court of the State of Connecticut, against the Pfotzers, (plaintiffs herein), but who are co-defendants in Civ. No. 14326, supra.

1) Amercoat-Ameron's primary complaint in Civ. No. 14326 in the Superior Court of Connecticut, supra, sought recovery against the defendants (Pfotzers) for certain underground piping material they had supplied to defendants, and as also against co-defendant Transamerica Insurance Co. on its performance bond.

¹ Because of its essentiality to plaintiffs' (Pfotzers) brief they consider it necessary to set out their statement in comprehensive scope so as to delineate the principal reciprocal chronological developments in the two concurrent actions involved, one Civ. Action 14326 in the Superior Court, the other Civ. Action B-947 in the District Court below.

Pertinently, the defendants (Pfotzers) had been directed in writing, by the third party defendant (City of Norwalk in Civ. 14326, supra) to install plaintiff's piping material in connection with defendants' (Pfotzers) contract with the City of Norwalk as involving the construction of a sewage treatment plant. Said City of Norwalk's written direction to the defendants (Pfotzers) as the City's agent in the specific transaction followed prior negotiations, as exclusively between the plaintiff (Amercoat in Civ. 14326, supra) and the third party defendant (City of Norwalk in Civ. 14326, supra) and wherein Amercoat had warranted its piping material (to the City of Norwalk) for the specific purpose intended, as under the unusual attendant construction conditions involved, and which allegedly had been made known to Amercoat, by the City of Norwalk.

2) Subsequent to defendants' (Pfotzers) installation of Amercoat's piping material (under Amercoat's constant field supervision), its pipe failed. The latter in that it did not, and could not perform or serve the specific purpose for which the third party defendant (City of Norwalk had in writing directed it to be ordered of Amercoat), and to whom Amercoat had warranted its piping material. Following the failure of plaintiff Amercoat's pipe material, the third party defendant, City of Norwalk, thereafter instructed and ordered defendants (Pfotzers) in writing not to pay Amercoat for the pipe material which Amercoat had supplied the defendants (Pfotzers) on the third party defendant's (City of Norwalk) written order to defendants (Pfotzers), supra.

3) Defendants (Pfotzers), following the failure of Amercoat's underground piping material (the complete details of which underground piping failure, were at all times intimately known to the City of Norwalk) were in October 1969, served by Amercoat with a summons and complaint for the book value of Amercoat's pipe material as supplied defendants (Pfotzers). Immediately after the filing of Amercoat's complaint against the defendants, they requested the City of Norwalk in writing to take over the defense of Amercoat's primary suit against the defendants (Pfotzers) in Civil Action No. 14326, Superior Court of Connecticut inasmuch as they had been acting as the City of Norwalk's agent in the transaction. Thereafter, following the City of Norwalk's refusal to take over the defense of Amercoat's primary action, defendants (Pfotzers) then seeking complete indemnification from the City of Norwalk, (under the facts and circumstances involved as then completely known to the City of Norwalk) third-partied in the City of Norwalk as a defendant and as liable over to plaintiff Amercoat in Civ. Action 14326, supra.

4) Said third party defendant, (City of Norwalk) following its refusal to take over the defense of plaintiff's (Amercoat's) primary action in Civ. 14326, supra, and thereby indemnifying these named defendants (Pfotzers) in the primary action, did nevertheless, in its responsive pleadings, allege that defendants and third party plaintiffs (Pfotzers) had properly installed Amercoat's underground piping material in accord with Amercoat's instructions and under its field supervision. The City of Norwalk also alleged that Amercoat's piping material was defective for the purpose intended, and which resulted in its

subsequent failure and thus breaching Amercoat's specific warranties and representations (as had been made exclusively to the third party defendant, City of Norwalk). Further, in its answer, the City of Norwalk, included a cross-claim against the plaintiff (Amercoat), and a counter-claim against the defendants (Pfotzers).

5) On June 18 1973, following extensive discovery procedure in a related proceeding against the City of Norwalk, as also involving Amercoat's pipe materials, defendants (Pfotzers) filed their motion requesting the Superior Court of Connecticut's leave (in Civ. 14326) to file an "Amended Answer and Counter-claim" as a set-off etc. against the plaintiff (Amercoat). The foregoing allegedly based on Amercoat's fraud, deceit and misrepresentation as involving its piping material sold to the defendants (Pfotzers), and for all related damages stemming from the defendants (Pfotzers) having to install said material in accord with Amercoat's specifications and damages flowing from the replacement of said Amercoat piping material. Plaintiffs (Amercoat) made no timely objection to the filing of defendants' (Pfotzers) said motion etc., and as a consequence of which defendants' (Pfotzers) "Amended Answer and Counterclaim", filed in accord with Section 132 of the Connecticut Practice Book, as a matter of law automatically became an integral part of the pleadings in the subject action.

Subsequently, however, plaintiff's (Amercoat's) attorney, H. M. Lessin, Esq., was to fraudulently allege that he had not received the said motion, and the attached "Amended Answer and Counterclaim", as served on June 18, 1973, until July 16, 1973 (App. 123a-124a-125a).

On July 20, 1973, Honorable A. Tunick, Judge, at the hearing of the "Short Calendar" elected to adopt plaintiff's fraudulent statement of its alleged non-receipt of appellants' motion etc. of June 18, 1973, until July 16, 1973, (despite Pfotzers' production of said counsel's certified mail receipt of June 19, 1973) and denied defendants (Pfotzers) said motion to "Amend and Counterclaim". The decision of July 20, 1973 as made by the Superior Court of Connecticut in Civ. 14326 (Tunick, Judge) was an interlocutory ruling involving defendants' (Pfotzers) basic rights in the litigation. Thereafter, defendants (Pfotzers) appealed said adverse decision to the Supreme Court of Connecticut and plaintiff (Amercoat) thereupon moved to dismiss, because the appeal allegedly was interlocutory. In his argument before the Supreme Court of Connecticut, plaintiff's (Amercoat) counsel, H. M. Lessin, Esq., again with intent to mislead the Supreme Court of Connecticut did fraudulently state he had not received appellants' motion "Amended Answer and Counterclaim" until July 16, 1973 (App. 3a-117a-118a). The Supreme Court of Connecticut did not consider Atty. H. M. Lessin's signature on the certified mail receipt dated June 19, 1973 as relevant to the interlocutory appeal.

Subsequently, defendants' (Pfotzers) appeal of the said Superior Court's denial of defendants' motion to file an Amended Answer and Counterclaim was denied by the Supreme Court. The latter on the grounds it was an interlocutory appeal (App. 121a), and which original appeal is presently a part of defendants' pending appeal of April 9, 1976 before the Supreme Court of Connecticut (App. 61a-62a-74a-122a).

6) Hearings on the merits of plaintiff's (Amercoat's) primary action commenced before State Referee P. B. O'Sullivan on September 9, 1974, and at which time the plaintiff presented and rested its case. Immediately thereafter, and prior to the defendants, third-party plaintiffs (Pfotzers), and the third party defendant (City of Norwalk) proceeding in the action, all parties, including the court, by stipulation (enforceable contract) entered in open court, then individually, each in turn, agreed that the State Referee, P. B. O'Sullivan, supra, would thereafter hear and decide the entire action (App. 2a-3a-40a-41a-42a-43a-45a-50a-51a-52a).

The said entire action was then by the State Referee's order continued to November 18, 1974, as in accord with terms of the said stipulation, supra. Pertinently, the hearing of the entire action, by the terms of the stipulation, was to include the defendants' "Amended Answer and Counterclaim," as originally filed by motion on June 18, 1973, and would further include the complete third party action, the latter as embracing the third party defendant's (City of Norwalk's) cross complaint against the plaintiff herein (App. 2a-3a-40a-41a-42a-43a-45a-50a-51a-52a).

Pursuant to, the plaintiff (Amercoat) thereafter unilaterally breached that stipulation and refused to proceed to trial on November 18, 1974, in accord with the terms of the stipulation, supra, (App. 35a-36a-37a-68a-69a-75a-76a). No mistrial was ever announced, sought by appropriate motion, or recorded in connection with said trial of September 9, 1974, supra, (App. 33a-40a to 54a inclusive, 85a-86a).

7) On July 24, 1975, a second trial of Civ. 14326 was had on the merits before Honorable Harold H. Dean, Judge, Superior Court of Connecticut. The trial was restricted by the court to the primary action, and without defendants' "Amended Answer and Counterclaim of June 18, 1973" in the action as in accord with plaintiff's (Amercoat) insistence, and as over defendants' and third party plaintiff's contrary demand, and defendants' and third party plaintiffs' (Pfotzers') timely objections and exceptions. This second trial of Civ. Action 14326, supra, on the merits of the primary action alone, resulted in judgment in favor of the plaintiff, (Amercoat-Ameron), said judgment was reopened on September 29, 1975, by the court's ruling on defendants' (Pfotzers) motion served August 1, 1975 (App. 34a-35a).

8) Subsequently, on December 3, 1975, more than six years after plaintiff (Amercoat) had commenced its primary litigation of Civ. Action 14326 in the Superior Court of Connecticut, and after defendants and third party plaintiffs (Pfotzers) therein had been compelled to answer in excess of three hundred and eighty separate proceedings and responses², in four different courts, and as following two prior hearings on the merits of plaintiff's primary action herein, the plaintiff² (Amercoat)

² The plaintiff (Amercoat) and third party defendant (City of Norwalk) collusively sought to withdraw their respective complaints in the total action, in their attempt to vitiate both the primary action and third party action. The latter after having theretofore been informed by defendants and third party plaintiffs (Pfotzers) that their cost to defend the entire action had to December 3, 1975, cost Pfotzers in excess of \$55,000.00 (as the aforesaid plaintiff and third party defendant both well knew, and for which \$55,000.00 the Pfotzers were seeking indemnity and correlated damages from said two parties.) See paragraph 3), supra.

sought to withdraw its action against the defendants (Pfotzers). Specifically, on December 3, 1975, plaintiff² without prior notification to these defendants and third party plaintiffs (Pfotzers), at what had been scheduled to be a pre-trial conference pertinent to the scheduled Civ. Action 14326 trial of the primary action to the court, and of the third party action to the jury. The plaintiff (Amercoat) by obvious prearrangement, and as acting collusively with the third party defendant² attempted to effect the following procedures: (App. 76a-77a-79a-80a-81a and 130a - Document 47 - Exhibit No. 3).³

(a) Plaintiffs (Amercoat) sought to restrictively withdraw its complaint against Edmond Pfotzer and Transamerica Insurance Company but otherwise leaving E. John Pfotzer in the action. For the Court's confirmation of the fact that plaintiff did not in fact withdraw its action against therein defendant E. John Pfotzer - defendants and third party plaintiffs (Pfotzers) are annexing as Exhibit A a copy of the oral stipulation as was collusively entered into in open Court (before Hon. Harold H. Dean, Judge) by the plaintiff (Amercoat) and by the third party defendant (City of Norwalk) over E. John Pfotzer's timely objection and exception (App. 130a- Document 47 - Exhibit No. 3, supra).³

(b) The City of Norwalk, third party defendant, likewise without notice to the defendants and third party plaintiffs (Pfotzers) and as acting collusively with the plaintiff, sought to withdraw its third party cross-complaint against the plaintiff (Amercoat), yet leaving its third party defendants'

² Ibid

³ Also see Exhibit "A"-annexed and incorporated.

counterclaim against the third party plaintiffs (Pfotzers) in the third party action. The foregoing over defendants' and third party plaintiffs' (Pfotzers) objection and exception Exhibit A, supra, annexed.

9) On March 16, 1976, the Superior Court of Connecticut, Hon. Harold H. Dean, Judge, ruled insofar as the entire scope of Civ. Action No. 14326 - Primary Action and Third Party Action - "And therefore there is nothing for this court to try." (App. 35a-76a-77a). Exception to said ruling was taken by defendants (Pfotzers).

10) On April 1, 1976, the Supreme Court of Connecticut, Hon. Harold H. Dean, Judge, denied defendants' and third party plaintiffs' (Pfotzers) motion for reargument etc. as involving the said court's decisions of March 16, 1976, supra, (App. 35a-66a to 73a inclusive, 80a-81a).

11) On April 13, 1976, defendants and third party plaintiffs (Pfotzers) filed their appeal of the Superior Court's decisions in Civ. Action 14326 as were in their totality involved in the court's decisions paragraph (9), supra, (App. 61a-74a to 82a inclusive).

12) On April 26, 1976 plaintiff (Amercoat) filed its motion to dismiss defendants' and third party plaintiffs' (Pfotzers) appeal as filed April 13, 1976 (App. 74a to 82a).

13) On October 20, 1976, defendants and third party plaintiffs (Pfotzers) received decision of Supreme Court of Connecticut. Exhibit "B" annexed and incorporated indicating dismissal granted.

FOR PROCEDURES IN CIV. ACTION B-917 IN THE UNITED STATES DISTRICT COURT FOR THE STATE OF CONNECTICUT SEE PAGE 4 SUPRA

ARGUMENTPOINT I

THE DISTRICT COURT BELOW HAS JURISDICTION OF THE SUBJECT MATTER OF THE "STIPULATION OF DISMISSAL OF NOVEMBER 11, 1974." AND OVER THE PERSON OF THE PARTIES THERETO.

Plaintiffs (Pfotzers) submit that the court below has jurisdiction over the subject matter, and over the person of the parties, in accord with applicable law as set out under POINTS II to X, infra. Its jurisdiction, and power, should have been exercised in the pending situation in the furtherance of the cause of justice. The latter need stems from defendants' (Amercoat et al) breach of the "Stipulation of Dismissal of November 7, 1974," as entered in the lower court, and of the concomitant failure of defendants' consideration on which the stipulation, supra, was predicated.

It is likewise submitted that this court, on appeal, possess jurisdiction and power as necessary to accord plaintiffs' belated justice in this situation, and that it should utilize these essentials to do equity as is contemplated by: "THE FEDERAL RULES OF CIVIL PROCEDURE":

Rule 1. Scope of Rules. These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

The foregoing Rule 1 should have particular and timely application in view of the fact, that the Superior Court of Connecticut, in which the antecedent "Stipulation of September 9, 1974," was entered in open court, has ended its judicial function.

Pursuantly, plaintiffs (Pfotzers) inform this court that the record in the Superior Court of Connecticut, as in the court below, evidences that the defendants herein (Amercoat et al) have used virtually every harassing procedural tactic available to them to preclude the several actions coming to trial, and have thereby, successfully deprived these plaintiffs "by abuse of process" of a just, speedy and inexpensive determination of the issues herein involved as mandated by "Rule 1", FRCP.

Nearly seven years of such abusive litigation tactics was potentially concluded when the defendants colluded with the third party defendant (City of Norwalk) in Civ. Action 14,326 of the Superior Court of Connecticut in preventing the original primary and derivative third party action therein coming to trial. The latter by their joint endeavors to mutually withdraw their respective actions, one against the other, and against these plaintiffs (Pfotzers). Presently, said defendants herein, on April 26, 1976, attempted to further delay these plaintiffs' in the Supreme Court of Connecticut by moving to dismiss Pfotzers' appeal*(defendants therein). It is to preclude a further protracted series of inevitable like actions*that these plaintiffs (Pfotzers) presently seek to restore their action in the court below, so as to mitigate in part the clear fact herein, that "justice delayed is justice denied." The need for expeditious decision is emphasized by the intended scope of Rule 1, of FRCP, as mandating that justice should be speedy, otherwise delay is a potent sort of denial.

* See Exhibit "B", annexed and incorporated, received October 20, 1976 as granting Amercoat's motion to dismiss Pfotzer's appeal dated April 9, 1976

POINT II

THE DEFENDANTS (AMERCOAT-AMERON) ARE THE ONE AND SAME PARTIES REFERRED TO IN THE SUBJECT "STIPULATION OF DISMISSAL" AS WAS ENTERED IN THE COURT BELOW ON NOVEMBER 11, 1974, AND AS REFERRED TO IN THE PRIOR STIPULATION OF SEPTEMBER 9, 1974, ENTERED IN THE SUPERIOR COURT OF CONNECTICUT.

Plaintiffs (Pfotzers) invite the attention of the court to the second, third, and fourth paragraphs of the "Stipulation of Dismissal," dated November 11, 1974, (App. 38a-39a), and which include the following words:

"Whereas, the parties are in dispute as to the terms of a Stipulation entered into in one of these actions, Civil Action 14326 in the Superior Court of the State of Connecticut on September 9, 1974..." (underlining supplied).

"Whereas...., but without prejudice to the prosecution of such claim as is presented in Civil Action 4768 and in Civil Action B-947, supra, in Civil Action 14326 in the Superior Court of the State of Connecticut." (underlining supplied).

"Now therefore...., but without prejudice to the prosecution of such claim in Civil Action 14326 in the Superior Court of the State of Connecticut, with costs to abide the determination of Civil Action 14326 in the Superior Court of the State of Connecticut, said costs to be determined in accord with the applicable Federal Rules of Civil Procedure and Federal Statutes." (underlining supplied).

The parties Pfotzer v. Amercoat and A eron, herein (Civil Action B-947) are the same and identical parties as correlative involved in Amercoat v. Transamerica et als (Pfotzers) in Civil Action 14326, in the Superior Court of the State of Connecticut, supra. Accordingly, whatever actions the defendants (Amercoat and Ameron) took in the subject action was in fact being concomitantly taken by Amercoat in Civil Action 14326, and vice versa. At no time are different entities involved, nor acting separately in the separate actions.

Pursuantly, the acts of the parties as were progressively taken in either of the two separate actions, is in legal effect, the concurrent acts of the parties as involved in the related action. Which in effect means that the parties "collective left hand" at all times knew what their "collective right hand" was doing, etc. And the words "without prejudice" supra, imports that no right or remedy of the parties is in any legal sense affected.

Accordingly, when defendants (Amercoat-Ameron) agreed in the quoted third paragraph of the subject stipulation supra, that the parties were in dispute, it meant the parties in the subject action were in dispute as to the terms of the "Stipulation of September 9, 1974," supra. Moreover when defendants (Amercoat-Ameron) entered into the subject "Stipulation of Dismissal of November 11, 1974." (App. 28a-29a) they well knew that the same parties had on September 9, 1974, (App. 35a-36a-40a to 54a inclusive), unequivocally agreed to permit the plaintiffs (Pretzers) to refile their answer, (as had been originally filed July 9, 1973) as a pleading in Civ. Action 14296, and as to which the herein defendants had reserved their right to answer (App. 52a-53a-54a). The immediate foregoing to the end, that the two parallel derivative actions, then pending in the United States District Courts for the States of Connecticut and Delaware might thereby be consolidated, and fully litigated at the one time in the Superior Court of Connecticut. This was the basic purpose of the two separate stipulations, (App. 41a) and as "without prejudice" (App. 38a-39a) supra, namely: consolidation of the several actions.

Additively, the defendants herein (Amercoat-Ameron) well knew on November 11, 1974 (App. 38a-39a), that the only manner in which

the therebefore separate actions could be consolidated, so as to fully litigate the derivative issues then pending in the two Federal Courts, *supra*, as stemming from Civ. 14326 in the Superior Court, was by these plaintiffs refiling their "Answer and Counter-claim" as originally filed in the Superior Court of Connecticut of July 9, 1973 (App. 52a-116a-117a); the defendants herein subsequently answering, or not answering as they might elect, under the applicable rules of the Connecticut Practice Book.

The immediate foregoing, consolidation of the separate actions, (App. 41a-52a) represented the basic intent and consideration promised by the defendant (Amercoat-Ameron) in the subject related actions (App. 84a-85a-86a). Should the defendants herein (Amercoat-Ameron) breach either of the correlative stipulation agreements, *supra*, there would be a corresponding breach of the other. That is: a breach of the "Stipulation of September 9, 1974," as entered in the Superior Court of Connecticut, *supra*, would constitute an automatic breach of the November 11, 1974 "Stipulation of Dismissal" entered in the District Court below (App. 28a-29a) as a consequence of the correlated failure of defendants' consideration. Defendants should not now be heard to say, that their collective left hand as operating in Civil Action 14326, in the Superior Court of Connecticut, was unaware, and in fact should not have known, what their collective right hand in Civil Action B-947, in the District Court below was doing. Such fiction, should not be countenanced by this court, as it has been countenanced in the court below (App. 8a-9a).

POINT III

DEFENDANTS' WILFUL BREACH OF THE STIPULATION OF SEPTEMBER 9, 1974, AS ENTERED IN THE SUPERIOR COURT OF CONNECTICUT, WAS CORRELATIVELY A WILFUL BREACH OF THE NOVEMBER 11, 1974 "STIPULATION OF DISMISSAL" ENTERED IN THE DISTRICT COURT BELOW.

The Court is at this point requested to scrutinize the several listed facts set out in plaintiffs' affidavit of April 13, 1976 (App. 33a to 86a inclusive) to the end that it may be conversant with the chain of relevant facts as developed between the date of the "Stipulation, September 9, 1974," (as entered into by the parties in Civil Action No. 14326, in the Superior Court of Connecticut) and the date of the affidavit, supra. Reference to (App. 84a-85a-86a) will evidence that an oral stipulation was entered in open court by the parties in that action before Hon. P. B. O'Sullivan, State Referee. Informatively, it is to be correlatively noted that by that stipulation, the third party defendant, City of Norwalk, (not herein otherwise involved) gave up no rights it formerly had. Nor did it make any concessions that would represent any consideration for its participation in the said stipulation. But it nevertheless did get the collateral benefit of the plaintiffs herein waiving their prior right to a jury trial in Civil Action 14326, supra.

On the other hand, the therein defendants and third party plaintiff (Pfotzers) (in Civ. Action 14326) agreed to waive their right to a jury trial in the third party action, and agreed to withdraw with prejudice their two protective subsequent derivative actions, as were pending in the United States District Court for the State of Connecticut, and the State of Delaware respectively,

wherein Pfotzers were the plaintiffs, and Amercoat and Ameron the defendants, (App. 28a-29a). Pertinently, the latter actions, as had been claimed for jury, closely paralleled plaintiffs' (Pfotzers) prior Amended Answer and Counterclaim as had been filed in the Superior Court of Connecticut on July 9, 1973 (App. 53a). The filing of the latter paper had been erroneously denied in the Superior Court of Connecticut, on July 20, 1973, and the denial despite the defendants' herein failure to timely object to such inclusion, as in accord with the applicable provisions of Section 132 (c) of the Connecticut Practice Book (App. 91a-110a-123a).

Additively, the action in the United States District Court for the State of Delaware had been previously set up for an early trial, (on or before February 15, 1975). Thus, a certain trial date was also given up by plaintiffs herein as a part of their consideration for the correlative stipulations of September 9, 1974 and November 11, 1974, respectively. In addition, both of the said District Court actions, *supra*, had been claimed for jury trial (App. 11a to 14a inclusive).

The herein defendants' (Amercoat and Ameron) consideration for the two subject stipulations, *supra*, consisted of its agreement: (a) that the entire action, and as including Pfotzers' Amended Answer and Counterclaim of June 18, 1973, (filed on July 9, 1973) was to be tried to the State Referee, Hon. P. B. O'Sullivan on November 18, 1973, in lieu of being tried to the jury (App. 84a to 86a inclusive), Accordingly, by said "Stipulation" of September 9, 1974, Pfotzers' complaints, (and as including the Counterclaim, *supra*) in the United States District Courts for the State of Connecticut and for the State of Delaware, (the latter

scheduled for trial to the jury in February 1975) would be withdrawn as a consequence of their specific consolidation with Civil Action 14326 in the Superior Court of Connecticut.

Moreover, in accord with the terms of the subject "Stipulation of Dismissal" dated November 11, 1974, (App. 28a-29a), and specifically as set out in the third and fourth paragraphs thereof "...but without prejudice to the prosecution of such claim... in Civil Action 14326 in the Superior Court of the State of Connecticut." defendants (Amercoat-Ameron) were bound to so perform in Civ. Action 14326, in such manner as not to prejudice the full litigation of the complaint as was being dismissed in Civil Action B-947 of the court below (App. 53a).

Accordingly, it was incumbent on the defendants herein (Amercoat-Ameron) not to prevent the plaintiffs (Pfotzers herein and as defendants in the prime action in Civil Action 14326 in the Superior Court of Connecticut), from refiling their Amended Answer and Counterclaim dated June 18, 1973, and as filed on July 9, 1973, supra, in said court, supra (App. 121a). And further that within the prescribed state rule period, they would duly file their answer, including any special defenses they might wish to raise responsive to such filing (App. 52a). Defendants' and plaintiffs' "Stipulation of Dismissal" of November 11, 1974, (App. 28a-29a), was made in consideration of their prior "Stipulation of September 9, 1974," (App. 40a to 54a inclusive), and as in accord with said agreement, these plaintiffs (Pfotzers) promptly withdrew their subject parallel actions, as had been previously filed in the United States District Courts for the States of Delaware and Connecticut respectively; and additively, these plaintiffs waived

their right to a jury trial in the said Superior Court. Plaintiffs (Pfotzers) herein duly fulfilled all aspects of their stated consideration for the "Stipulation of Dismissal" (App. 28a-29a-32a-34a). Thereafter, the defendants herein (Amercoat-Ameron) unilaterally breached the stipulation of September 9, 1974, and of November 11, 1974, *supra*.

Pursuant, at no time did defendants (Amercoat and Ameron) at anytime subsequent to September 9, 1974, move to secure the Superior Court of Connecticut's interpretation of the terms of the stipulation of September 9, 1974 (App. 35a), and correlatively they failed to move to restore the two derivative actions in the two federal courts as had been duly withdrawn by these plaintiffs (Pfotzers), *supra*.

POINT IV

DEFENDANTS HAVING CORRELATIVELY BREACHED THE STIPULATION OF SEPTEMBER 9, 1974, AND THE STIPULATION OF NOVEMBER 11, 1974, THERE RESULTED A CORRELATIVE FAILURE OF DEFENDANTS' INVOLVED CONSIDERATIONS, AND WHICH SHOULD BE EVALUATED IN ACCORD WITH THE ERIE V. TOMPKINS DOCTRINE.

Plaintiffs submit for this Court's consideration that not only have defendants (Amercoat and Ameron) unilaterally breached the stipulation of September 9, 1974, entered in open court between the parties in the initial litigation between the parties in the Superior Court of the State of Connecticut, but defendants thereby correlatively breached the "Stipulation of Dismissal" of November 11, 1974 entered in the District Court below. As a consequence of the correlative breaches there has been a complete failure of the considerations on which the said stipulations were

premised. Pursuantly, the courts have found that a contract without the essential consideration is a nullity, 7 Am Jur 925; 12 Am Jur 570.

Apropos of the immediate foregoing, when the defendants herein (Amercoat and Ameron) breached the stipulation of September 9, 1974, as had been voluntarily agreed to by the parties in the Superior Court of Connecticut, and on which the subsequent "Stipulation of Dismissal of November 11, 1974," in the court below was solely predicated, defendants' sole consideration for the November 11, 1974, stipulation in the District Court failed. The basic consideration having failed - the "Stipulation of Dismissal" on which it was predicated became a nullity.

Pertinently, it is to be noted that the subject action is a diversity action. Therefore, applicable State of Connecticut law applies. The latter pursuant to Erie v. Tompkins doctrine, and as expounded in Ruhlin v. New York Life Insurance Company (1938) 304 U. S. 202, 58 S. Ct. 260, 32 L. ed 1290, wherein the court stated:

"the decision in Erie R. Co. v. Tompkins...settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity."

Accordingly, it is submitted that this court's decision should be premised on appropriate decisions of the Connecticut Courts. The Connecticut Supreme Court in Bryan v. Reynolds, 143 Conn. 456 has decided certain relevant pivotal points as are herein involved. Specifically, the following pertinent aspects are set out in the headnotes of the cited case:

"The court with jurisdiction of the subject matter of an action has inherent power to enter judgment in that action by stipulation. (See POINT I, supra).

Such a judgment is not a judicial determination of a litigated right but the embodiment of a contract in a form which places the matters covered by it beyond further controversy. If the judgment conforms to the stipulation it cannot be altered or set aside unless the stipulation was obtained by fraud, accident or mistake. (underlining supplied).

Apropos of the foregoing, this court's attention is invited to the fact that defendants' sole consideration for the "Stipulation of Dismissal of November 11, 1974" was not supplied plaintiffs; in that there has been an undeniable wilful breach of defendants' promise to litigate the consolidation of plaintiffs' claims in the court below, with the initial primary action in the Superior Court of Connecticut.³ The stipulation, supra, embraced plaintiffs' (Pfotzers) complete cause of action in the court below, and which complete cause of action was theretby agreed to be consolidated in, and litigated with Civil Action 14326 in the Superior Court of Connecticut. Defendants repetitively reneged, and thereby breached the basic promise and intention of that agreement. The defendants' (Amercoat and Ameron) promise as involving the consolidation of Civil Action B-947 in the court below with Civil Action No. 14326 in the Superior Court of Connecticut was not plaintiffs' tactic, and which according to the below court's ruling was not as "advantageous as they anticipated" (App. 2a). The stipulation to consolidate and litigate without prejudice was the basic consideration, a "sine qua non"^{3*} for the "Stipulation of Dismissal" contract of November 11, 1974.

Further, as related to the basic aspect of "failure of defendants' consideration" it appears that the court below did not give such principles of applicable law due weight in its "Ruling..." of May 13, 1976 (App. 2a). Specifically, that as a consequence of

³ See Exhibit "A" annexed and incorporated.
See Exhibit "B" annexed and incorporated.

defendants' wilful failure to perform as promised, (App. 51a-53a) supra, there has been a "failure of consideration," that is, defendants' breach of the essential and indispensable conditions for which these plaintiffs bargained. The courts have pertinently stated, as herein involved, that:

"A 'failure of consideration' occurs where, without his fault, one who has given or promised to give some performance fails to receive in some material respect the agreed exchange for such performance."

"The word 'consideration' as used in the term 'failure of consideration', means the promised performance of one part agreed to be exchanged for that of the other.² There is a failure of consideration where one who has given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for the performance.³"

Apropos of the foregoing, plaintiffs submit that the failure of defendants' (Amercoat and Ameron) consideration occurred between the making of the agreement on September 9, 1974, and March 16, 1976 etc. Failure of defendants' consideration as stemming from their wilful breach of the agreement should not result in destroying plaintiffs' legal rights in this action as was commenced by their summons and complaint in the district Court below.

POINT V

DEFENDANTS HAVING BREACHED THE CORRELATIVE STIPULATIONS OF SEPTEMBER 9, 1974 AND NOVEMBER 11, 1974 RESPECTIVELY, PERMITS PLAINTIFFS (PFOTZERS) TO CEASE PERFORMANCE UNDER THE STIPULATION OF NOVEMBER 11, 1974, AND SEEK DAMAGES FOR THE RESPECTIVE BREACHES.

²Restatement, Contracts §274, comment (1932); 3 Williston, Contracts §814, p. 2292 (rev. ed. 1936).

³ 3 Williston, supra, note 2, p. 2293.
Durkee v. Busk, 355 P. 2d 588.

Plaintiffs assert as a matter of law that defendants (Amercoat and Ameron) having unilaterally breached the correlated stipulations of September 9, 1974 and November 11, 1974, that plaintiffs are legally permitted to cease all further previously agreed performance under them, and to seek damages for their breach. The foregoing as in accord with:

"NONPERFORMANCE OF CONDITION"

"§1253 - Discharge or Suspension of Duty by the Other Party's Breach of Contract," (Corbin on Contracts - Vol 6 - Page 9 - 1962 edition). Pertinently:

It is submitted that as a consequence of defendants' wilfull breach of the stipulations, supra, and the total failure of defendants' agreed exchange or promises (consideration) that plaintiffs (Pfotzers) are privileged to render no further performance on their part as related to those stipulations, supra. Accordingly, they now seek to have their original actions in the United States District Courts restored to their original status quo, and to additively amend their complaints to maintain an action, and or file a new action for damages covering defendants' breach of the parties' stipulation of September 9, 1974 and that of November 11, 1974. The said stipulations being enforceable agreements - that is, "of which a court of equity might decree specific performance at the instance of either party" Meagher v. Reeney, 96 Conn 116, 117, Billings v. Vandertieck, 23 Barb. 546 (N. Y. 1857).

Pertinently, it is submitted that the record evidences that the plaintiffs (Pfotzers) have been greatly damaged by defendants' total breach of the stipulation of September 9, 1974, and that of November 11, 1974, (App. 72a-77a), the record substantiates that plaintiffs:

(a) were progressively since October 1969, denied a speedy and economical trial of all issues;

(b) were subsequently deprived of their "cherished rights" to a full jury trial in accord with Connecticut statutes;

(c) were compelled to make costly and time consuming appeals to the Supreme Court of Connecticut and the United States Court of Appeals for the Third Circuit in their endeavor to protect their involved rights in the **subject** litigation;

(d) were compelled to expend in great measure, their financial resources in subsequently seeking (as witness herein their efforts) to advance their parallel litigation in the United States District Court for the State of Connecticut and the United States District Court for the State of Delaware;

(e) were compelled to initiate and defend a long series of harassing procedural developments (abuse of process) since October 1969, in the Superior Court of the State of Connecticut, in their heretofore futile attempts to secure a speedy and economical trial, and all as shown on the Superior Court of Connecticut docket record;

(f) are currently engaged in an appeal to the Supreme Court of Connecticut (as set out in Exhibit C of Affidavit (App. 74a to 82a inclusive);

(g) are still awaiting in the district court below the potential establishment of a date for full trial of the entire action with all its further costly delays and developments. Such trial date is still a high uncertainty inasmuch as such date will inevitably be extended as a consequence of the filing of plaintiffs' subject appeal before this court as seeking the completion

of the subject litigation, Civil Action No. B-947 in the United States District Court for the State of Connecticut.

POINT VI

DEFENDANTS COMMITTED FRAUD IN THE INDUCEMENT AS RELATED TO THE SUBJECT STIPULATION OF DISMISSAL DATED NOVEMBER 11, 1974.

Plaintiffs assert that defendants (Amercoat-Ameron) induced the plaintiffs to participate in the "Stipulation of Dismissal of November 11, 1974" by fraud. The latter is attested by the fact defendants then well knew when they entered into the said stipulation, that they did not intend to adopt and discharge on their part the pertinent promises of its antecedent "Stipulation of September 9, 1974," and on which faithful performance of the "Stipulation of Dismissal of November 11, 1974" was predicated (App. 103a-104a-114a-115a-116a-122a-123a). Specifically, defendants then well knew that in due course they would endeavor to develop the following sequential procedures:

On September 9, 1974, defendants' (Amercoat-Ameron) co-counsel, H. M. Lessin, Esq. personally agreed to the terms of the stipulation in the Superior Court of Connecticut (App. 33a-35a-84a-85a-86a) and wherein it was agreed that plaintiffs (Pfotzers) herein would refile their "Amended Answer and Counterclaim" as originally filed July 9, 1973, and concomitantly agreed to the dismissal of their two parallel actions in the respective federal District Courts of Connecticut and Delaware.

On December 3, 1976, following a series of prior actions, as also in breach of the "Stipulation of September 9, 1974" the same counsel, H. M. Lessin, Esq., supra (without prior notice to the

Pfotzers) attempted to withdraw for the herein defendants' (Amercoat-Ameron) complaint against the herein plaintiffs (Pfotzers) and collusively the City of Norwalk, third party defendant in that state action/sought to withdraw its counterclaim against Amercoat-Ameron in the action (App. 34a-76a-79a) and as shown by Exhibit 3 (page 2) referenced and incorporated by (App. 129a - item 40)3. Plaintiffs herein (Pfotzers), as the record indicates, objected unsuccessfully to such endeavor to withdraw (see page 3 of Exhibit 3, supra). The latter in that Pfotzers' "Amended Answer and Counterclaim" supra had not been consolidated and litigated in the action as agreed in the "Stipulation of November 11, 1974" in the Court below (App. 74a-75a-76a-114a). Pertinently, if the pleadings contained Pfotzers' Counterclaim, its presence under "section 52-80 of the General Statutes of Connecticut" would preclude withdrawal, absent Pfotzers' concurrence thereto (App. 79a-80a)3.

Next, the Court's attention is invited to the fact that defendants' (Amercoat-Ameron) counsel, Kevin J. Maher, Esq., had personally signed the "Stipulation of Dismissal of November 11, 1974", supra (App. 29a). In lieu of faithfully discharging the terms of this latter stipulation, Kevin Maher, Esq., personally, as co-counsel for Amercoat-Ameron in the Superior Court action (Civ. No. 14326, supra), joined with his co-counsel, H. M. Lessin, Esq., supra, in attempting to withdraw the Amercoat-Ameron primary action in the Superior Court, and thus put these plaintiffs out of Court despite Pfotzers' objection and exception both in the State Court and in the District Court below. See Exhibit 3 (pages 1 and 2) referenced and incorporated by (App. 130a item 47)3*.

3 Also as Exhibit A-annexed and incorporated.
See Exhibit "B" annexed and incorporated.

The attention of this Court is further invited to the fact that as a direct consequence of these defendants' (Amercoat-Ameron) fraud in the inducement of the "Stipulation of Dismissal of November 11, 1974" they then intended to:

- (1) Subsequently, unilaterally reject the clear and unambiguous terms of the antecedent "Stipulation of September 9, 1974" which they had voluntarily entered into; and
- (2) That relatedly they would never seek of the Superior Court of Connecticut any interpretation of any alleged disputed terms of the said "Stipulation of September 9, 1974" (App. 28a-29a) and POINT II, supra; and
- (3) That they would in every manner possible continue to endeavor to thwart the refiling of the plaintiffs' herein "Amended Answer and Counterclaim" as had been originally filed in the Superior Court of Connecticut on July 9, 1974; and
- (4) That they would seek to induce the Superior Court of Connecticut to rule that the "Stipulation of September 9, 1974" which had in fact been suggested and agreed to by the presiding State Referee, was beyond the subject matter jurisdiction of the said State Referee (App. 34a); and
- (5) That they intended not to go to trial on any issues involved in the consolidated actions, on November 18, 1973, as in fact had been agreed to in the "Stipulation of September 9, 1974; and
- (6) That they in fact intended to otherwise by any means possible circumvent the hearing of the subject matter of their complaint in Civ. Action 14326 in the Superior Court of the State of Connecticut (App. 34a-74a to 92a inclusive); and

(7) That they intended to collaterally accept and reap the benefits of the said "Stipulation of November 11, 1974" as long as possible and in the meanwhile collaterally utilizing "abuse of process procedures": in the said Superior Court to accomplish the full attrition of these plaintiffs' (Pfotzers) most limited resources as required to continue with the action in Civ. 14326 in the said Superior Court; and

(8) That they intended, following their breach of the correlated stipulations of September 9, 1974 and November 11, 1974 respectively, to convince the court below that despite their correlative breaches of the Stipulations of September 9, 1974 and November 11, 1974 respectively, that the issues as originally involved in this action were rendered res judicata as a consequence of the "Stipulation of Dismissal of November 11, 1974"; and

(9) That for the totality thereof defendants would thus be able to secure and enjoy "unjust enrichment" as a product of their calculated fraud in the inducement of the "Stipulation of November 11, 1974" by avoiding litigation of the subject action filed in the lower court, and simultaneously avoiding litigation of the parallel issues in the Superior Court of Connecticut (App. 117a-118a).

POINT VII

FRAUD, MISREPRESENTATION AND OTHER MISCONDUCT ON THE PART OF THE DEFENDANTS ARE GROUNDS FOR RELIEF SHOULD THIS COURT ACT ON ITS OWN MOTION UNDER RULE 60 (b) OF F.R.C.P.

Plaintiffs assert that basically involved in their direct motion for the Court below to vacate the "Stipulation for Dismissal of November 11, 1974", is the fact that in pertinent record

of Civ. Action No. 14326, in the Superior Court of Connecticut, evidences that the said dismissal in the Court below was induced by the defendants' (Amercoat-Ameron) misrepresentation to these plaintiffs, to the court below, and to the Superior Court of Connecticut in Civ. Action No. 14326 (App. 40a-54a inclusive).

Plaintiffs (Pfotzers) assert that the defendants well knew, when they joined with the plaintiffs "for dismissal with prejudice" in the Court below (App. 28a-29a), that they did not intend to honor said stipulation of November 11, 1974 (POINT II, supra) and by their false representations they thereby lead these plaintiffs and the court below into a false sense of security as related thereto. The foregoing in that defendants subsequently failed and refused to consolidate and proceed with the litigation in the Superior Court of Connecticut as in accord with the "Stipulation of September 9, 1974" (App. 40a-54a). The latter stipulation being incorporated in the subject November 11, 1974 stipulation (App. 28a-29a). The consolidation and litigation of plaintiffs' (Pfotzers) complaints in the two federal courts was the sole basic purpose and intention of the agreed "Stipulation of Dismissals" of the several federal actions.

Moreover, defendants did at the time of signing said "Stipulation of Dismissal of November 11, 1974" in the court below, otherwise know they intended to subsequently repudiate and breach that agreement (contract) and then if necessary to ultimately assert in this court, as it already has done, that the dismissal with prejudice carried with it an irrevocable status of res judicata of the involved issues against the plaintiffs (App. 129a item 29).

It is submitted however, that the federal courts have by their interpretation of Rule 60 (b) established that there is relief for the injured party in such a situation whereby the Court may, as under Rule 60 (b), act upon its own motion or upon the motion of an aggrieved party to remedy the injury as caused by fraud as in: Chas. Pfizer & Co. v. Davis - Edwards Pharm. Corp. (CA 2d, 1967) 385 F 2d 533 11 FR. Serv. 2d. 60 B. 25 Case 1., Root Refining Co. v. Universal Oil Products Co. (CCA 3d, 1948) 169 F 2d 514 541, Hazel - Atlas Glass Co. v. Hartford Empire Co. (1944) 322 U. S. 238, 246 83 L. Ed. 1250, Relief from Civil Judgments 1952 (61 Yale L. J. 76. 79, 80).

Plaintiffs assert that defendants' "fraud in the inducement," as inducing plaintiffs (Pfotzers) to participate in the voluntary subject "Stipulation of Dismissal of November 11, 1974", and defendants' subsequent collusive and integrated acts of "fraud" as were progressively utilized by the defendants in Civ. Action No. 14326 - Superior Court of Connecticut (POINT VI, supra), were of such nature and premeditated timing that the plaintiffs were unaware of, or unable to discover the overall fraud until it was ultimately revealed during the period December 3, 1975 to April 1, 1976. Said overall fraud included the defendants' (Amercoat-Ameron) attempted withdrawal of their primary complaint on December 3, 1975, and as was co-conspired in by Kevin Maher, Esq., defendants' counsel herein. Said pattern of defendants' fraud is set out in one aspect thereof as contained in Exhibit "D" as annexed to plaintiffs' brief dated April 13, 1976 (App. 129a - item 40)*.

Plaintiffs (Pfotzers) assert that the law is well settled as it relates to actions involving "fraud" and "fraudulent conceal-

* See Exhibit "B" annexed and incorporated.

ment," and the deterrent power thereof to remedy any misuse of any statute of limitations as under certain aspects of Rule 60 (b) as a bar to plaintiffs' subject motion as already has been interposed by the defendants herein (App. 129a - item 39). As pertinent thereto plaintiffs cite the following cases as relate to the non-bar of various statutes of limitations (as otherwise enumerated in Rule 60 (b)) under fairly analogous circumstances; namely: Bailey v. Glover (Sup. Ct. Oct. 1874), American Tobacco Co., et al v. Peoples Tobacco Co. Cir. Ct. Appeals Fifth District, April 12, 1913, No. 2,372).

Plaintiffs pertinently invite the Court's specific attention to the following excerpts from Bailey v. Glover, *supra*, as appears on pages 344, 345, 347, and 349, *supra*:

"We submit rather that the action does not 'accrue' while the fraud is concealed"

"...in mitigation of the strict letter of general statutes of limitation, namely: that when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it";

"In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within the proper time after the discovery of the fraud"

"To hold that by concealing a fraud or by committing a fraud in a manner that it concealed itself until such a time as the party committing a fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent frauds the sans by which it is made successful and secure." (underlining supplied).

POINT VIII

THE COURT BELOW HAS OSTENSIBLY BEEN INDUCED TO ADOPT DEFENDANT'S UNSUPPORTED AND ERRONEOUS STATEMENT THAT THERE "EXISTED" A JUSTICABLE DISPUTE ABOUT THE TERMS OF THE STIPULATION OF SEPTEMBER 9, 1974, AS WAS ENTERED IN THE SUPERIOR COURT OF CONNECTICUT.

Plaintiffs' submit for this court's attention that in the second paragraph of the "Stipulation of Dismissal of November 11, 1974" (App. 28a-29a) appear the words:

"Whereas the parties are in dispute as to the terms of a stipulation entered into in one of these actions, Civil Action 14326 in the Superior Court of the State of Connecticut, and..." (See POINT II, supra).

Pertinently, plaintiffs assert that despite said wording (as introduced by the defendants in that document) that to their knowledge, there never had been a dispute by the parties herein concerning the terms of the "Stipulation of September 9, 1974", supra.

Apropos of the foregoing, the court is specifically requested to take note that on April 20, 1976, on the occasion of the oral argument on plaintiffs' motion to set aside the "Stipulation of Dismissal of November 11, 1974", defendants' (Amercoat-Ameron) counsel at (App. 118a) has stated that:

"Justice O'Sullivan at that time said that a written stipulation by all parties must be entered."

Pertinently reference to (App. 40a to 54a - transcript at the hearing) will evidence that Judge O'Sullivan never made that statement. It is believed that defendants' counsel made his erroneous statement without having the prerequisite familiarity with the record that he should have had. Nevertheless, the court below was seriously mislead on a most material point. It is believed defendants' counsel should promptly correct this erroneous state-

ment. In support of plaintiffs' contrary related position plaintiffs invite this court's attention to the content of (App. 84a-85a-86a). Further at (App. 120a) defendants' counsel states "he is not a party to Civ. 14326 in the Superior Court." For a correction of that erroneous statement, plaintiffs refer this court to (App. 121a-130a being Document No. 47 - Exhibit No. 3 thereof) and wherein he "played out" a most significant role in Civ. Action 14326 - namely an attempted withdrawal of that action.

Pursuant, the record shows that on no occasion have the defendants (Amercoat-Ameron) at any time or place:

(a) Sought to set out its understanding, in contradiction of the clear meaning of the said stipulation of September 9, 1974, as based on the terms or language used by the involved parties.

(b) Sought judicial interpretation of any alleged disputed terms, language or intent as clearly expressed by the said stipulation entered in the Superior Court of Connecticut (Court of origin of September 9, 1974 stipulation).

(c) But contrariwise, the record shows the defendants have avoided seeking clarification of any alleged dispute of terms, language, intent or stipulation meaning involved, because heretofore defendants' attempts at obfuscation thereof in the courts below have to date ostensibly succeeded.

(d) Defendants have treached, but not otherwise renounced the subject "Stipulation of Dismissal". Had the defendants renounced the agreement, then perforce the "Stipulation of Dismissal of November 11, 1974" would have constituted a nullity in the court below.

(e) The involved records evidence the defendants herein did

not mistake the intent of the terms of the "Stipulation of September 9, 1974," for they subsequently clearly demonstrated their understanding of the intentment of the said stipulation by ostensibly agreeing to the consolidation of the action in this Court with the primary and initiating action in the Superior Court of Connecticut. How else could they have agreed to that stipulation (POINT II, supra)?

(r) The herein defendants' acceptance on November 11, 1974, of the "Stipulation of September 9, 1974," as theretofore entered in the Superior Court of Connecticut, constituted on its face a voluntary waiver of prior impediments, and their agreement that their overall interests were best served by potential enforcement of the agreement. Presently defendants not only continue to act in "bad faith," but concomitantly seek to secure a forfeiture of plaintiffs' involved claims in the court below, and thereby correlativey secure unjust enrichment.

Pursuant to the legal effect of the subject stipulations of September 9, 1974 and November 11, 1974, plaintiffs (Pfotzers) submit it is universally agreed that:

"once made, a settlement agreement terminates that litigation and a new superseding arises which is the measure of each party's obligations to each other (Owens v. Lombardi, 41 A. D. 2d 432). Such a stipulation is a contract in itself and the court may not be required to seek intent from other sources or to determine the understandings of the parties other than from the words of the stipulation itself."

Furness v. Bestline Products International, Inc.
(New York Law Journal 3-22-76).

Pertinently, it is clear, that should this court seek to construe the stipulation of November 11, 1974, as made in the court below, and as basically referenced to the stipulation of September

9, 1974, entered in the Superior Court of Connecticut, it should properly refer to the words of the latter stipulation itself to determine the intention of the parties, *supra*.

Pursuant to what do the defendants herein say the language of the September 9, 1974 stipulation means? Defendants have fictitiously and repetitively asserted that a dispute existed between the parties as to the terms of the "Stipulation of September 9, 1974", (App. 28a-29a) but have singularly failed to disclose the basis for their repetitive allegation. Again, the basic question remains "Why not?"

It is respectfully submitted to this Court that on the occasion of the oral argument, it would be a propitious time for the defendants to be asked and to unequivocably inform the court as to the details of their alleged dispute concerning the terms of the "Stipulation of September 9, 1974" and then to specifically indicate to this Court the particular language of the said stipulation on which their contrariwise interpretation is predicated. Surely by this late date these defendants should be able to readily inform this court of its position, and what they have done to advance the matter for judicial remedy.

Finally, the obvious question remains for this court's consideration:

If defendants' counsel could tell the court below on April 20, 1976, at the oral argument on plaintiff's motion (App. 118a) *supra*: "Justice O'Sullivan at that time said that a written stipulation must be entered" and he knew then, that there was no written stipulation in fact entered to provide for the consolidation and litigation of plaintiffs' (Pfetzers) claims in this court,

with those in Civ. 14326 of the Superior Court of Connecticut, then the fact of said counsel's signing of the "Stipulation of Dismissal of November 11, 1974" was on its face a conscious misrepresentation to these plaintiffs, and which induced plaintiffs to sign the "Stipulation of Dismissal" (App. 29a-30a), and on which, they subsequently relied to their great detriment and damage.

POINT IX

BREACH OF THE TWO CORRELATIVE STIPULATION AGREEMENTS BY DEFENDANTS, AND AS COUPLED WITH THEIR CORRELATIVE FRAUD IN THE INDUCEMENT, AND RELATED FAILURE OF THEIR INVOLVED CONSIDERATIONS WARRANTS RESTORING PLAINTIFFS, FIRST AMENDED COMPLAINT, IN THE COURT BELOW, TO ITS STATUS QUO PRIOR TO THE STIPULATION OF DISMISSAL DATED NOVEMBER 11, 1974.

Plaintiffs (Pfotzers) submit, that as a consequence of the defendants (Amercoat-Ameron):

(a) Having entered into two voluntary correlated stipulation agreements with the plaintiffs, dated September 9, 1974, and November 11, 1974 respectively so as to provide for the consolidation and litigation of the original action herein with Civ. 14326 in the Superior Court of Connecticut, the latter a related action involving the same transaction or occurrence (POINT II, supra); and

(b) Said defendants having unilaterally breached the two correlated stipulations (POINT III, supra); and

(c) Which defendants' correlative breaches resulted in the complete failure of defendants' consideration (POINT IV, supra); and

(d) In that defendants having unilaterally breached the two correlative stipulations and thereby caused the complete failure of their consideration for the said stipulations permits the plaintiffs to cease performance under the stipulation of November 11, 1974, and seek damages for the breaches of said stipulations (POINT V, *supra*); and

(e) Inasmuch as the two stipulations, *supra*, were entered into by the plaintiffs only because of defendants' misrepresentations and affirmative fraud in the inducement thereof (POINT VI, *supra*); and

(f) Because misrepresentation, fraud and other misconduct on the part of the defendants are adequate grounds for providing legal and equitable relief to the plaintiffs this court should initially act under its own motion under Rule 60 (b) of F.R.C.P. etc; and

(g) To have the "Stipulation of Dismissal of November 11, 1974, set aside and the subject action restored to its former status on the active docket for further proceedings.

Plaintiffs further submit that as set out in Am. Jur. "Fraud and Deceit", Section 19, the authorities therein cited, have invariably stated that: "Fraud destroys the validity of everything into which it enters and vitiates the most solemn contract and documents, even judgments." Quite understandably, courts view the practice with abhorrence. Likewise, the courts have invariably taken the position: "that fraud at any stage of the transaction vitiates all to which it attaches." Udell vs. Atherton 7 H&N 181; Petroleum Transportation Company vs. United States, 101 Ct. Claims 114 (1944).

Pursuantly, plaintiffs assert that the involved record in Civ. 14326, of the Superior Court of Connecticut, evidences that the defendants herein (Amercoat-Ameron) had fraudulently induced plaintiffs herein to enter the "Stipulation of September 9, 1974" on which the "Stipulation of November 11, 1974" was predicated and thereafter in "bad faith" repudiated and breached those correlative stipulations, *supra*.

Having breached the Stipulation of September 9, 1974, *supra*, as was secured by fraud in the inducement, defendants should not now be permitted to thwart the single intent of the stipulation of November 11, 1974, (paragraph (a), *supra*), and thereby retain the fruits of the fraud by subsequently asserting as they have (App. 129 - Document 39) the doctrine of *res judicata*, which is not the doctrine to be applied under the abnormal conditions present herein.

Defendants' (Amercoat-Ameron) fraud in this action is not to be sustained or perpetuated by the statute of limitations as normally contemplated by the full scope of Rule 60 (b) of F.R.C.P. It is otherwise submitted that the limitation on defendants' fraud involved herein is otherwise to be measured from the time it was first discovered or made manifest - specifically at the time it became a full reality in the period December 3, 1975 to April 1, 1976 inclusive.

In consideration of the totality of the foregoing plaintiffs (Pfotzers) contend that defendants' (Amercoat-Ameron) "fraud in the inducement", breach of the correlated stipulations, and the failure of defendants' consideration, as expressly set out in the stipulation agreements of September 9, 1974 and November 11,

1974 respectively, should not result in vitiating plaintiffs' subject action as commenced in the District Court below, and as presently correlative providing unjust enrichment to the herein defendants. The latter as presently by the forfeiture of plaintiffs' original subject claims, or by justice being further denied by continued delay.

POINT X

THE DISTRICT COURT BELOW, PRIOR TO THE "STIPULATION OF DISMISSAL OF NOVEMBER 11, 1974", HAD A "LIVE LITIGATION" BEFORE IT; AND WHICH LITIGATION WAS VITIATED BY DEFENDANTS' FRAUD IN INDUCING PLAINTIFFS TO JOIN IN THE STIPULATION, AND BY DEFENDANTS' BREACH THEREOF, AND BY THE FAILURE OF DEFENDANTS' CONSIDERATION, AND ACCORDINGLY JUSTICE DICTATES THAT THE SAID "STIPULATION OF DISMISSAL" SHOULD BE SET ASIDE AND THE ACTION RESTORED TO ITS ORIGINAL STATUS QJC.

Plaintiffs (Pfotzers) submit that prior to November 11, 1974, they had a "live litigation" before the United States District Court below. However, that live, "on the move litigation" was terminated by defendants' (Amercoat-Ameron) promise to consolidate the subject litigation in said lower court, with the then status quo situation of Civ. Action 14326 on September 9, 1974, in the Superior Court of Connecticut. Would the herein defendants' counsel now desire to unequivocably state to this Court that defendants' (Amercoat-Ameron) counsel had a contrary intent on November 11, 1974, when he signed the "Stipulation of Dismissal" in the court below? And, if so, what was that contrary intent?

The correlative record in the two courts, *supra*, (POINT III, *supra*) evidences that the defendants (Amercoat-Ameron) herein,

have in fact wilfully breached their promise to litigate the original action in the District Court below, *supra*, by consolidating it with Civ. Action 14326, then pending in the Superior Court of Connecticut. The defendants having wilfully breached their promises, as constituted the "sine qua non" of the "Stipulation of Dismissal of November 11, 1974", can it seriously be argued that the defendants have not, in fact, breached the correlated stipulations of September 9, 1974, and of November 11, 1974, and as thereby causing the attendant "failure of consideration" correlatively involved and on which these plaintiffs (Pfotzers) had relied?

Surely, these plaintiffs (Pfotzers) are not adopting an unreasonable position when they respectfully urge this court to remand, and mandate the reinstatement of their action in the court below to its status quo as prior to November 11, 1974. The latter so as not to deny them in law or equity the now belated prosecution of their original action, and to which they are properly entitled by the obvious intendment of Rule 1 of the Federal Rules of Civil Procedure (POINT I, *supra*).

The record shows that the defendants, along with the third party defendants (the City of Norwalk) in Civ. Action 14326 in the Superior Court of Connecticut, have done their utmost, not only to prevent consolidation of the several actions, as promised in the correlative stipulations of September 9, 1974 and November 11, 1974, but in attempting to prevent all related litigation. This after nearly seven years of prior litigation therein. And thus to endeavor to escape concurrent indemnification liability (see "Statement of Facts", *supra*) for all related costs, and

damages as incurred by these plaintiffs from the very inception (October 1969) of defendants' (Amercoat-Ameron) primary action in the Superior Court of Connecticut, and of the subject derivative action in the United States District Court below (December 1973).

Plaintiffs (Pfotzers) respectfully suggest to this Court that they have a timely right to be heard, "and to their day in court", and that albeit, belatedly, justice should now commence to move forward in this United States Court of Appeals for the Second Circuit.

Plaintiffs further submit that the record is abundantly clear that defendants (Amercoat-Ameron) have not in any sense supplied a "good faith" compliance with the "Stipulation of Dismissal of November 11, 1974" as was entered in the court below. On the contrary, defendants' antithesis "bad faith" has been fully exhibited by the defendants in the court below, and in the coordinate Connecticut State Court. Can there be a really serious question on that score in the mind of this court? The apparent final act (to date) in the defendants' "bad faith litigation" was played out in the period December 3, 1975 to April 1, 1976 (POINT VI, *supra*). The latter when despite the "Stipulation of September 9, 1974, and November 11, 1974" respectively, the defendants (Amercoat-Ameron) herein and the third party defendant, the City of Norwalk, following two hearings in the Superior Court of Connecticut, and in order to avoid certain judgments against themselves, colluded to withdraw their respective actions against one another, and against these plaintiffs, and over the plaintiffs' objections (as in violation of applicable Connecticut

statutes) in their attempt to defraud the plaintiffs of their legal rights in the several actions (App. 130a - Document No. 47 Exhibit No. 3)?

These plaintiffs do not believe that this court, when made fully aware of the fraudulent and "bad faith tactics" of the defendants (Amercoat-Ameron) in this total litigation, will fail to remand to the court below, and order the reinstatement of plaintiffs' original action for further proceedings in the district court below.

CONCLUSION

The historical record of the aborted lawsuit between the plaintiffs (Pfotzers) and the defendants (Amercoat-Ameron) is documented in the docket entries of the District Court (App. 1a to 5a). The case began with the filing of a complaint in December of 1973 and was aborted in November 1974 as a consequence of the parties' voluntary "STIPULATION OF DISMISSAL", which the plaintiffs had accepted, only as consequence of defendants' fraud in its inducement. Subsequently, there was a failure of defendants' involved consideration. As a consequence of the aforesaid correlative combination, these plaintiffs have not had their day in court as pertinent to the merits of their claims, and therefore plaintiffs have not received the adjudication of their rights under our judicial system. Hence the dispute between the parties continues.

Also as Exhibit "A"-annexed and incorporated.

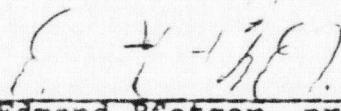
WHEREFORE, in consideration of the totality of the foregoing facts set out, and the authorities cited in support of appellants' (plaintiffs') argument, it is respectfully submitted that plaintiffs' "MOTION TO SET ASIDE THE STIPULATION OF DISMISSAL OF NOVEMBER 11, 1974" as filed in the United States District Court below on March 11, 1976 (App. 30a) ought to be granted, and the action remanded to said court for further proceedings, and that plaintiffs (Pfotzers) be granted such other and further relief as in this court's judgment is warranted.

Respectfully submitted,

For the plaintiffs,

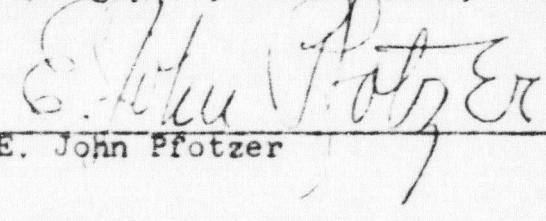
By:


E. John Pfotzer, pro se


Edmond Pfotzer, pro se

CERTIFICATE OF SERVICE

20:10
I hereby certify that on this 22nd day of October, 1976, I forwarded by U. S. certified mail, postage prepaid, two copies of the foregoing "Brief" to: Kevin J. Maher, Esq., (Maher & Maher, Esqs.), 955 Main Street, Bridgeport, Connecticut, 06601.


E. John Pfotzer

IN THE UNITED STATES DISTRICT COURT
FOR THE SECOND DISTRICT

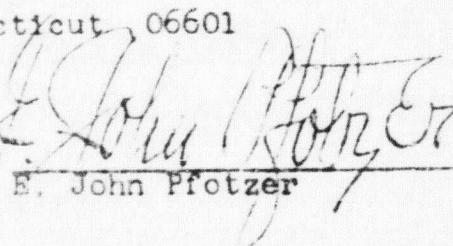
EDMOND PFOTZER, ETC, ET ANO, :
Plaintiffs-Appellants, : Oct. 20, 1976
vs. : Docket No. 76-7340
AMERCOAT CORPORATION and :
AMERON, INC., ETC. :
Defendants-Appellee, : AFFIDAVIT COVERING
(D.C. Civil Action No. B-947). : PROOF OF SERVICE.
STATE OF DELAWARE } :
COUNTY OF NEW CASTLE } ss. :

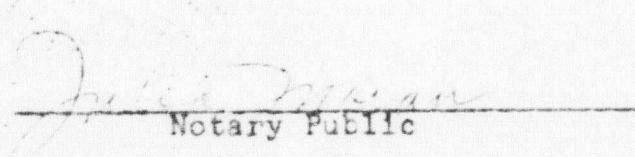
E. John Pfotzer being duly sworn deposes and says that he is one of the appellants appearing pro se in the above captioned action, that he is fully familiar with all the facts related herein, and that he makes this affidavit in connection with the following proof of service:

I certify that on October 20, 1976, I forwarded two copies of appellants' "Brief" and one copy of appellants' "Appendix" via United States mail postage prepaid (certified mail-receipt requested) to:

Kevin J. Maher, Esq.
Maher & Maher, Esqs.
955 Main Street,
Bridgeport, Connecticut 06601

Subscribed and sworn to before
me this 20th day of October, 1976


E. John Pfotzer


Notary Public

NO. 14326 : SUPERIOR COURT
AMERCOAT CORPORATION : FAIRFIELD COUNTY
VS. : AT STAMFORD
TRANSAMERICA INSURANCE CO., ET AL. : December 3, 1975

BEFORE THE HON. HAROLD H. DEAN

Stipulation

APPEARANCES:

FOR THE PLAINTIFF: Slavitt & Connery
by: Harry M. Lessin, Esq.

Maher & Maher (On the cross-complaint)
by: Kevin Maher, Esq.

FOR THE DEFENDANT: City of Norwalk (On the third party
complaint)
Arthur Goldblatt, Esq.
Assistant Corporation Counsel

E. John Pfeifer, pro se

EXHIBIT NO-A

Reported by:

Robert C. McCarthy

a

MR. GOLDBLATT: For the City of Norwalk, one of the named defendants in the third party complaint, there is the appearance of the corporation counsel, Arthur Goldblatt.

The record might note that present in the courtroom, although not a party to this stipulation, is Mr. E. John Pfotzer, who is pro se.

MR. MAHER: We'd also like the record to show that, although not present in the court house, an appearance had been filed by Attorney Ferederick Dahlmeyer, for the named defendant Transamerica Insurance Company.

THE COURT: Gentlemen, I understand that you have entered into a stipulation.

MR. GOLDBLATT: That is correct, your Honor. There is a stipulation that has been agreed to by counsel for Amercoat Corporation and for the City of Norwalk. How would you denominate your role?

MR. MAHER: The stipulation will be for Amercoat Corporation as plaintiff, and as defendant on the cross-complaint.

THE COURT: And you represent them on the cross-complaint?

MR. MAHER: As defendant on the cross-complaint filed by the City of Norwalk.

MR. GOLDBLATT: The following stipulation has

been entered into between counsel just now mentioned, as follows:

It is stipulated that Amercoat Corporation, also known as Ameron Corporation, hereby withdraws its action against Transamerica Insurance Company and Edmund Pfotzer for the value or price of certain pipe delivered to the defendants Pfotzer, and waives any such claim against the City of Norwalk.

The City of Norwalk withdraws its cross-complaint, having been filed in its answer, special defense and cross-complaint filed March 30, 1970, against the said Amercoat Corporation in connection with said pipe and all other claims against Amercoat Corporation it has or may have in connection with the subject matter of this suit.

And that stipulation has been agreed to, as I understand it, by Attorney Lessin.

MR. LESSIN: That's correct.

MR. GOLDBLATT: I believe it has been, for the record, accepted by Mr. Maher, representing Amercoat Corporation as the defendant in the cross-complaint.

MR. MAHER: That's correct.

THE COURT: All right. And you'll file the withdrawal slips, gentlemen.

MR. LESSIN: Yes, your Honor.

MR. PFOTZER: I would like to have this, in

conjunction what's just transpired, for my position.

THE COURT: Yes. Your position is that you would oppose this if you could.

MR. PFOTZER: Yes.

THE COURT: However, you have no standing here.

MR. PFOTZER: Correct.

THE COURT: You may take an exception.

MR. PFOTZER: The defendants E. and E. J. Pfotzer enter their objection and/or exception to the proposed dismissal of Amercoat's action against E. and E. John Pfotzer.

THE COURT: I want to correct you. It is not a dismissal. It is a withdrawal.

MR. PFOTZER: Withdrawal of Amercoat's action against E. and E. J. Pfotzer. The foregoing, as a consequence of the operation of the law of the case, defendants assert that there is an answer and counterclaim present in the prior action ^{which} ~~has~~ been withdrawn, that has not, to date, been duly litigated, and the presence of which precludes Amercoat from withdrawing its action against defendants Pfotzer and Transamerica Insurance Company.

THE COURT: All right. Your objection is noted. You may have an exception.

* * * *

C E R T I F I C A T I O N

STATE OF CONNECTICUT:

SS: Stamford, Connecticut

COUNTY OF FAIRFIELD :

NO. 14326

AMERCOAT CORPORATION

VS.

TRANSAMERICA INSURANCE CO., ET AL

I hereby certify that the foregoing is a true and correct transcript of my stenographic notes of this stipulation in the above-entitled proceedings, heard before the Hon. Harold H. Dean, Superior Court, at Stamford Court House, on 3 December 1975.

So certified this date: 5 December 1975.

Court Reporter

B. This decision was received in the mail on Oct. 20, 1976 - the parties were ostensibly modified on October 18, 1976. The mailing envelope bears the machine stamped date Oct. 15, 1976.

John Pofziger

N.B.

Americoat Corporation v.
Transamerica Insurance Company
et al.

October 13, 1976. The plaintiff's motion to dismiss the appeal of the defendant Edmund Land et al. John Pofziger from the Superior Court in Fairfield County at Stamford is granted.

By the Court,

J. House
chief justice

all parties
notified on
Oct 18 1976
O&EA

BEST COPY AVAILABLE

EXHIBIT NO-B

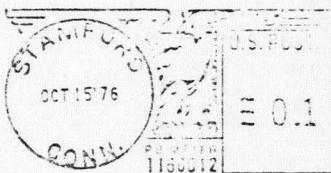
N.B. This decision was received in the mail
on Oct. 20, 1976 - the parties were
ostensibly notified on Oct. 18, 1976.
The mailing envelope bears the
machine stamped date Oct. 15, 1976.

E. John Pfotzer

EXHIBIT NO - B

Sheet 2 of 2

JOHN J. P. RYAN, D. C. A.
SUPERIOR COURT
COURT OF COMMON PLEAS
STAMFORD, CONNECTICUT 06905



E. J. Pfotzer
P. O. Box 987
Wilmington, Delaware 19801

IN THE UNITED STATES DISTRICT COURT
FOR THE SECOND DISTRICT

EDMOND PFOTZER, ETC, ET ANO, :
Plaintiffs-Appellants, : Oct. 20, 1976
vs. : Docket No. 76-7340
AMERCOAT CORPORATION and :
AMERON, INC., ETC. :
Defendants-Appellee, : AFFIDAVIT COVERING
(D.C. Civil Action No. B-947). : PROOF OF SERVICE.
STATE OF DELAWARE } :
COUNTY OF NEW CASTLE } ss. :

E. John Pfotzer being duly sworn deposes and says that he is one of the appellants appearing pro se in the above captioned action, that he is fully familiar with all the facts related herein, and that he makes this affidavit in connection with the following proof of service:

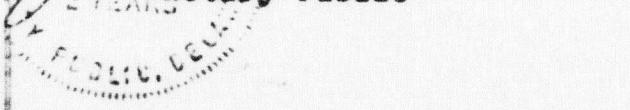
I certify that on October 20, 1976, I forwarded two copies of appellants' "Brief" and one copy of appellants' "Appendix" via United States mail postage prepaid (certified mail-receipt requested) to:

Kevin J. Maher, Esq.
Maher & Maher, Esqs.
955 Main Street,
Bridgeport, Connecticut 06601

Subscribed and sworn to before
me this 20th day of October, 1976

E. John Pfitzer

Notary Public



EDMOND PFOTZER, by E. John Pfotzer, his attorney-in-fact, and E. JOHN PFOTZER, Co-Partners Trading as E. and E. J. Pfotzer,

Plaintiffs-Appellants.

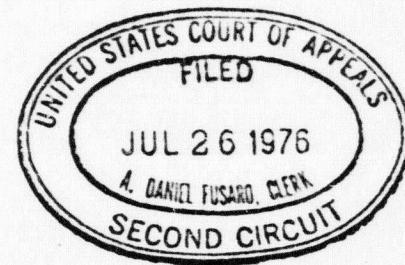
v.

AMERCOAT CORPORATION and AMERON, INC.

Defendants-Appellees

76-1340
CIVIL APPEAL
SCHEDULING ORDER

Docket No. 76-7340



Noting that E. John Pfotzer
appellant Pro-Se, has filed a Notice of Appeal, a Civil Appeal Pre-Argument Statement and Transcript Information, and being advised as to the progress of the appeal,

IT IS HEREBY ORDERED that the record on appeal be filed on or before
August 9, 1976.

IT IS FURTHER ORDERED that the appellant's brief and the joint appendix be filed on or before September 20, 1976.

IT IS FURTHER ORDERED that the brief of the appellee be filed 30 days after the filing of the appellant's brief.

IT IS FURTHER ORDERED that ten (10) copies of each brief shall be filed with the Clerk, but that the court may require as many as fifteen (15) additional copies before final disposition of the action.

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of November 8, 1976.

IT IS FURTHER ORDERED that in the event of default by appellant in filing the record on appeal or the appellant's brief and the appendix by the time directed or upon default of the appellant regarding any other provision of this order, the appeal may be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within the time directed by this order, such appellee shall be subjected to such sanctions as the court may deem appropriate.

Note

A. DANIEL FUSARO

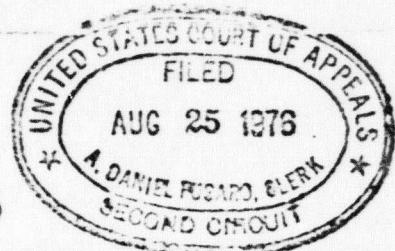
Clerk

{ 10 copies of Brief
10 copies Appendix

Vincent A. Carlin
By Vincent A. Carlin
Chief Deputy Clerk

Dated July 26, 1976

mailed first class - 10/20/76
Second Circuit.



Edmond Pfotzer, et al. v. Americocat Corp. et al.

It is hereby ordered that Edmond Pfotzer,
appellant pro se, may have until Oct. 27, 1976
in which to file his briefs and appendices.

Date: 8/25/76

Thomas J. Doherty
U.S.C.I.